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No. 81-2408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

v.

DONALD C. FLOWERS and KING E. JONES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the six-month limitations period contained in § 10(b) of the National Labor Relations Act determines the timeliness of a suit alleging that a union has breached the duty of fair representation created by that Act?

2. If not, whether in a hybrid § 301 breach-of-duty of fair representation action brought against an employer and union, the state statute of limitations governing actions to vacate arbitration awards, which *United Parcel Service v. Mitchell*, 451 U.S. 56, "borrowed" to determine the timeliness of the claim against the employer, also determines the timeliness of the claim against the union?

LIST OF PARTIES

In addition to the parties listed in the caption, the Bethlehem Steel Corporation was a defendant in the district court and an appellee in the court of appeals.

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BRIEF OF PETITIONERS

This brief is the joint product of petitioners—United Steelworkers of America, AFL-CIO-CLC ("USWA") and Local 2602 of the USWA—and the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the federation of national and international unions with which the USWA is affiliated. The decision of petitioners and the AFL-CIO to file a single brief reflects the identity of their views on the legal issues presented, and their desire to minimize the burden on the Court by stating their common position only once.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York is not officially reported and is reprinted at Pet. App. 12a-15a. The judgment of

the District Court is reprinted at Pet. App. 16a. The *per curiam* judgment of the United States Court of Appeals for the Second Circuit on the first appeal is unreported and is reprinted at Pet. App. 10a-11a. The order granting the first petition for certiorari, vacating the judgment of the court of appeals, and remanding the case for reconsideration in light of this Court's decision in *United Parcel Service v. Mitchell*, 451 U.S. 56, is reported at 451 U.S. 965, and is reprinted at Pet. App. 9a. The opinion of the court of appeals on remand is reported at 671 F.2d 87 and is reprinted at Pet. App. 1a-7a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was issued on February 1, 1982 (App. B). On April 21, 1982, Justice Marshall signed an order extending the time for filing a petition for a writ of certiorari to and including June 2, 1982 (App. G), and on May 20, 1982, Justice Marshall signed an order further extending the time for filing a petition to and including July 1, 1982 (App. H). The petition was filed on July 1, 1982, and a writ of certiorari was granted on November 29, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reprinted as an Appendix to this Brief.

STATEMENT OF THE CASE[1]

Respondents at all times relevant herein were employed by Bethlehem Steel Corporation (hereinafter "the Company"), and represented for collective bargaining purposes by petitioners United Steelworkers of America,

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[1] The case is here from the district court's granting of a motion to dismiss, and the court of appeals' reversal of that dismissal. Accordingly, the "facts" recited herein are those alleged in the complaint, which for present purposes must be assumed to be true.

AFL-CIO-CLC, and its Local Union 2602 (hereinafter collectively referred to as the "Union"). The Union and the Company were parties to a collective bargaining agreement which contained, *inter alia*, a grievance and arbitration procedure for resolving differences "as to the meaning and application of the provisions of this Agreement" (JA 14). The agreement empowered the Union to submit to arbitration grievances that could not be resolved between the parties in the four-step grievance procedure established by the agreement (*Id.* 24). The agreement further provided that the arbitrator's resolution of a grievance "shall be final and binding upon the Company, the Union, and all Employees concerned therein" (*Id.* 27).

Respondents, who were craft welders in the Company's "342 Garage Department," filed several grievances in 1975 and 1976 claiming that the Company had violated the collective bargaining agreement by assigning certain welding duties to employees in other job categories and to employees in other departments of the plant, rather than assigning those duties to a craft welder in the garage. At the time these assignments were made, respondents were on layoff or were assigned to non-craft work; respondents contended in their grievance that under the collective bargaining agreement the Company was required to recall respondents to their craft welding jobs to do the work in question. The grievances sought backpay for the work opportunities that respondents had lost (JA 32-54).

The Union processed the grievances through all steps of the grievance procedure. Throughout that process the Company insisted that the collective bargaining agreement permitted the job assignments which the Company admitted had been made. After exhausting the grievance process the Union invoked arbitration. On February 24, 1978, following an evidentiary hearing, the arbitrator issued an award holding that the Company had not vio-

lated the agreement by its method of assigning welding work (JA 62-68).

The complaint in this action was filed by respondents on January 9, 1979, eleven months after the arbitrator issued the award. The Company and the Union were both named as defendants. The complaint alleged that, contrary to the arbitrator's decision, the Company had violated the collective bargaining agreement by assigning welding work to others while respondents were laid off or assigned to other work (JA 7). The complaint further alleged that the Union's "preparation, investigation and handling of [respondents' grievances in arbitration] was so inept and careless as to be arbitrary and capricious, denying the [respondents] a fair hearing on their grievances" and thus constituting a violation of the Union's "duty to fairly represent [respondents] under section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a)" (JA 10). The complaint prayed "for all damages suffered by [respondents] as a result of the Employer's breach of the collective bargaining agreement and the [Union's] breach of their duty of fair representation," the damages to be "[a]pportion[ed]" among the defendants "as the Court deems just."

The Union and Company each moved to dismiss the complaint on the ground that the suit was time-barred (JA 12, 68). The district court granted the motions to dismiss, holding that New York's 90-day statute of limitations for actions to vacate arbitration awards was applicable to suits, like the instant one, against an employer and a union in which the underlying grievance had been submitted to arbitration (Pet. App. 14a). Respondents appealed to the United States Court of Appeals for the Second Circuit which reversed, concluding that actions of this type were governed by New York's six-year limitations period for actions for breach of contract (Pet. App. 10a).[2]

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[2] The court of appeals first set forth this conclusion in *Mitchell v. United Parcel Service, Inc.*, 624 F.2d 394 (1980), *rev'd*, 451 U.S. 56

The Union petitioned this Court for a writ of certiorari seeking review of the Second Circuit's decision. The Court granted the petition, vacated the judgment, and remanded the case for "further consideration in light of *United Parcel Service v. Mitchell*, [451 U.S. 56 (1981)]" which the Court had decided while the petition for certiorari in the instant case was pending (Pet. App. 9a).

On remand, a two-judge panel of the court of appeals affirmed the district court's judgment of dismissal in part and reversed that judgment in part. The court of appeals held that under *Mitchell* the arbitration statute of limitations was applicable to the claim against the Company, and that therefore that claim had been properly dismissed (Pet. App. 2a). But the appellate court concluded that *Mitchell* was not controlling on the limitations period for the claim against the Union (Pet. App. 5a). Treating that issue as one of first impression, the court rejected the Union's argument that the six-month limitations period of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) or, alternatively, the arbitration statute of limitation which had been applied to the claim against the Company, applied to respondents' claim against the Union (Pet. App. 5a-7a). Instead, the court of appeals held that New York's "three-year nonmedical malpractice statute of limitations applies to the employees' action against the union for breach of its duty of fair representation" (Pet. App. 6a-7a).

This Court issued a writ of certiorari to review this decision by the Second Circuit.

(1981), which was decided by the Second Circuit while the instant case was pending before that court. After it issued its decision in *Mitchell*, the court of appeals reversed the district court judgment in the instant case on the basis of that decision.

SUMMARY OF ARGUMENT

I. The first question presented here was expressly left open by this Court in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981): absent an express statute of limitations for the judicial cause of action for breach of the duty of fair representation, should § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), be applied to determine the timeliness of such actions or, instead, should state statutes of limitations be applied for that purpose. Because the duty of fair representation is a statutory duty, the limitations question here is one of discerning the intent of Congress.

Where Congress has expressly created a cause of action at law without expressly stating a time limit for that action, it is generally to be presumed that a time limit was intended, and, in the normal case, the most likely, if not the only, source for such a limit that Congress could have intended is a state statute of limitations for analogous actions. "But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). And in this context—in which Congress did not expressly create or even consider either the fair representation duty or the fair representation cause of action—Congress' failure to specify a time limit cannot be seen as any indication of Congress' intent with respect to the limit for that action.

Congress has not left the Court without guidance, however, as to the limitations period that should be applied to fair representation actions. The duty of fair representation is an integral part of the complex of employee, employer and union rights that together comprise the national labor policy established by Congress. That policy seeks to achieve industrial peace by means of a process of continuous collective bargaining, beginning with the formation of a collective agreement and continuing with

a grievance procedure for resolving disputes under that agreement; through these processes the "law of the shop" is to be established. Although serving important goals in the collective bargaining system, duty of fair representation claims—whether aimed at the union's conduct in negotiating the collective agreement or in resolving disputes under it—call into question those consensual processes and the law of the shop established through them.

In enacting § 10(b) Congress made a determination, albeit in the unfair labor practice context, as to the limitations period that best accommodates the sometimes conflicting values embodied in the national labor policy. Specifically, Congress chose a six month limitations period so as to protect the "stability of bargaining relationships." *Machinists Local v. Labor Board*, 362 U.S. 411, 425 (1960). The same values are at stake in establishing a time limit for the judicial fair representation action. Indeed, as Justice Stewart stated in his concurring opinion in *Mitchell*, § 10(b) applies, in terms, to "claims of a very similar character" to fair representation claims, 451 U.S. at 68 n.3—in particular, to unfair labor practice claims under §§ 8(b)(1)(A) & (b)(2) which impose on unions at least some, and perhaps all, of the obligations encompassed by the duty of fair representation. Thus, as Justice Stewart stated, § 10(b) represents a "clear congressional indication of the proper balance between the interests at stake." 451 U.S. at 70-71.

Application of state limitations periods, rather than § 10(b), would produce two anomalous results. First, unless § 10(b) is applied to judicial fair representation claims, the limitations period for such claims would vary depending on the forum chosen or, perhaps, depending on the specific type of fair representation violation alleged. And second, unless § 10(b) is applicable, the period of time during which collective bargaining agreements, or grievance resolutions under such agreements, would be subject to challenge would vary from state to

state; indeed the very same agreement or grievance resolution could be vulnerable in one state and not in another.

For all these reasons, § 10(b) provides the appropriate source for determining the timeliness of fair representation claims.

II. If the Court were to conclude, contrary to our showing in Part I, that state statutes of limitations, rather than § 10(b), apply to judicial fair representation claims, the Court would then have to determine which state limitations period is applicable. This is a "hybrid § 301 breach-of-duty action" in which it is alleged that the employer breached its collective bargaining agreement and that the union breached its duty of fair representation in prosecuting plaintiffs' grievance over the employer's asserted contractual breach. In such cases, the claim against the union necessarily challenges the validity of the resolution of the grievance reached through the grievance arbitration process. This is true for two reasons.

First, this Court recently ruled that in cases of this type the union may be held liable for a portion of the plaintiff's back wages. Such liability necessarily depends on a finding, in the case against the union, that a breach of contract occurred, and thus that the decision arrived at through the grievance-arbitration process—here the decision of the arbitrator—was incorrect. Second, in any event, proof that the union breached its duty of fair representation necessarily establishes that the grievance process malfunctioned. Such proof, perforce, drains all precedential force from the grievance resolution and thereby defeats a critical function of labor arbitration: to develop the law of the shop.

This Court's holding in both *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), and *Mitchell* rest on the recognition that an allegation that the union breached its fair representation duty necessarily entails a challenge to the arbitration process. In *Hines* the Court held

that "if it seriously undermines the integrity of the arbitral process the union's breach [of its fair representation duty] removes the bar of the finality provisions of the contract," 424 U.S. at 567, thereby enabling the plaintiff to challenge the employer's asserted breach of contract. And in *Mitchell* it was the alleged unfair representation by the union that led the Court to analogize the "hybrid" claim against the employer to an action to vacate an arbitration award; the employer secured the benefit of the arbitration limitations period (even though the employer's alleged misdeed was a breach of contract) because proof of a breach of the union's duty was necessary to establish the employer's liability. But given this reasoning—and given that the elements of the claims against the employer and Union are identical—it would be anomalous not to give a union the benefit of the same limitations period where, as here, the cause of action is against the union itself for its asserted breach of duty.

ARGUMENT

I. SECTION 10(b) OF THE NATIONAL LABOR RELATIONS ACT IS THE SOURCE FOR DETERMINING THE TIMELINESS OF A SUIT ALLEGING THAT A UNION HAS BREACHED ITS DUTY OF FAIR REPRESENTATION CREATED BY THAT ACT.

The first question presented here was expressly left open by this Court in *United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n.2 (1981): since the judicial cause of action for breach of the duty of fair representation is not subject in terms to a statute of limitations, should § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) ("NLRA" or "the Act"), be applied to determine the timeliness of such actions or, instead, should state statutes of limitations by applied for that purpose.

The *Mitchell* Court concluded that the question should not be decided in that case because it had been raised only by an *amicus curiae* and not "by either of the parties

here or below." *Id.* Only Justice Stewart would have decided the § 10(b) issue in *Mitchell*, and he would have held that "§ 10(b) is . . . the proper source for determining when claims of breach of duty must be raised." *Id.* at 68 n.3.[3]

Here, the question whether § 10(b) should apply was expressly decided by the court below, and that question is expressly raised in this Court, Pet. p. i. As we proceed to show, Justice Stewart's answer in *Mitchell* is the correct one: § 10(b) is the proper source for determining the limitations period for fair representation causes of actions.

The duty that the Union is alleged to have breached here—the duty of fair representation—is a "statutory duty," *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Thus, the asserted liability of the Union is "entirely a creature of [a] federal statute." *Northwest Airlines, Inc. v. Transit Workers Union*, 451 U.S. 77, 97 (1981). Because it is "the exclusive province of the Congress . . . to

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[3] Justice Blackmun stated in a concurring opinion in *Mitchell* that "I find much that is persuasive in Justice Stewart's analysis," but he agreed with the majority that resolution of the issue "should await the development of a full adversarial record." 451 U.S. at 65. Justice Stevens, in a dissenting opinion, while agreeing that it was "not appropriate" to decide the § 10(b) issue in *Mitchell*, *id.* at 75, nonetheless expressed disagreement with Justice Stewart's analysis, *id.* at 75-76. We address Justice Stevens' disagreement *infra* at 22-24.

In the wake of *Mitchell*, two courts of appeals have concluded that § 10(b) determines the limitations period for fair representation causes of action, at least where a state statute of limitation for actions to vacate arbitration awards is not applicable. *Hall v. Printing and Graphics Arts Union*, No. 82-1109 (7th Cir., Dec. 21, 1982); *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982). *See also* Grenig, *The Statute of Limitations in Fair Representation Cases*, 33 Lab. L.J. 483, 487 (1982). The Fifth Circuit, as well as the court below, has reached a contrary conclusion. *Edwards v. Sea-Land Service, Inc.*, 678 F.2d 1276 (5th Cir. 1982). The district courts likewise have reached conflicting conclusions. *See* Pet. p. 9 & n.3.

formulate legislative policies," *TVA v. Hill*, 437 U.S. 153, 194 (1978), the office of the judicial branch in the context of a statutory action is a limited one: "[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end," *id.*

Nowhere is this more true than with respect to statutes of limitations. For the "length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson v. Railway Express Agency*, 421 U.S. 454, 463-64 (1975). There is no sure calculus for making that value judgment and for fixing the balancing point; "any statute of limitations is necessarily arbitrary," *id.* Thus, the informed and flexible judgment of the legislative branch is particularly suited to the inherently discretionary process of setting limitations periods, and in this context it is especially important for the judicial branch to limit its role to "discern[ing] the meaning of [the] enactment." To state that task here, however, is far simpler than to perform it.

"When Congress has created a cause of action and has not specified the period of time within which it may be asserted, the Court has frequently inferred that Congress intended that a local limitation should apply." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). In essence, at least since *Campbell v. City of Haverhill*, 155 U.S. 610, 616, (1895), this Court has reasoned that where Congress has expressly created a cause of action at law without expressly stating a time limit for that action, it is generally to be presumed that a time limit was intended, and, in the normal case, that the most likely, if not the only, source for such a limit that Congress could

have intended is a state statute of limitations for analogous actions.[4]

"But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute." *Occidental Life Ins. Co. v. EEOC*, *supra*, 432 U.S. at 367. And if reason rather than rote is the guide, the peculiar origins of the fair representation cause of action make it the last one in which to draw the inference that Congress' failure to enact a limitations period shows a congressional intent

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[4] This reasoning was the basis on which the Court, in *Auto Workers v. Hoosier Corp.*, 383 U.S. 696 (1966), concluded that state limitations periods apply to actions between employers and unions, under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, for breach of collective bargaining agreements. The Court in *Hoosier*, after reviewing its usual practice of borrowing a state limitations period, concluded that "[a]gainst this background, we cannot take the omission [of a limitations period] in the present statute as a license to judicially devise a uniform time limitation for § 301 suits." *Id.* at 704. (The dissenters in *Hoosier* concluded that state law was not applicable because they found "no sound basis for saying that Congress by its silence on the limitations matter intended the state laws to apply . . . The courts *are* expected to develop the law of labor contracts, and this case represents only another task in this process." *Id.* at 710 (emphasis in original) (White, J., joined by Douglas and Brennan, JJ., dissenting).)

As Justice Stewart, the author of the Court's opinion in *Hoosier*, observed in his *Mitchell* concurring opinion, 451 U.S. at 65-67, *Hoosier* is not controlling on the limitations period for a fair representation cause of action (or for a § 301 action against an employer by an employee seeking to vindicate a claim of breach of the collective bargaining agreement which claim was rejected in the grievance-arbitration machinery established by the collective bargaining agreement). For *Hoosier's* holding favoring state limitations laws governs § 301 claims—and not fair representation claims—and, moreover, those § 301 cases presenting "the kind of contract dispute . . . [which does] not implicate 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.'" *Mitchell*, *supra*, 451 U.S. at 66 (Stewart, J., concurring), *quoting Hoosier*, *supra*, 383 U.S. at 702. *See also* pp. 16-17, *infra*.

that a state limitations period be applied. The fair representation *duty* was not expressly created by Congress but rather is one which this Court has found to be "implicit in the National Labor Relations Act." *Electrical Workers v. Foust*, 442 U.S. 42, 46-47 n.8 (1978). Furthermore, the *cause of action* for breach of that duty likewise has been "judicially 'implied from the statute,'" *Id.* at 47, *quoting Steele v. L. N.R. Co.*, 323 U.S. 192, 204 (1944).[5] And we have found no discussion whatever in the legislative history of the Wagner Act or the Labor Management Relations Act of 1947 ("LMRA") with respect to whether a fair representation duty existed under the NLRA, with respect to whether such a duty should be created, or *a fortiori* with respect to whether to create a judicial cause of action for breach of that duty.

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[5] While the Court has long and consistently recognized that the duty of fair representation is a statutory duty implied from the NLRA, the Court has been less clear as to whether, as *Foust* states, the cause of action for breach of that duty is an implied cause of action (with jurisdiction predicated on 28 U.S.C. §§ 1331 & 1337, the jurisdictional predicate relied on in *Tunstall v. Brotherhood*, 323 U.S. 210 (1944), for the fair representation cause of action implied under the Railway Labor Act) or whether it is an express cause of action under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. *Compare, e.g., Syres v. Oil Workers*, 350 U.S. 892 (1955) (relying on *Tunstall* to sustain jurisdiction for a judicial fair representation action under the NLRA) *with Humphrey v. Moore*, 375 U.S. 335 (1964).

That *Foust* properly resolves this issue is apparent from the following considerations. Section 301 creates a cause of action for breaches of those duties that are imposed by contract, and not by operation of law. The duty of fair representation, however, is a statutory—rather than a contractual—duty (p. 10, *supra*). Indeed, in some fair representation cases, such as *Steele v. L. & N.R. Co.*, 323 U.S. 192 (1944) or *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), the object of the suit is to have the court *invalidate* provisions of a collectively-negotiated contract—provisions with which the parties to the contract have been complying; plainly such actions cannot be deemed to arise under § 301. And while in other fair representation cases, such as the instant case, plaintiffs' attack is on the manner in which the union has prosecuted a grievance

Congress therefore has not considered any of the questions concerning the nature of the fair representation duty or the judicial cause of action to enforce the duty. Congress' "failure" to specify a time limit cannot, accordingly, be seen as any indication of Congress' intent with respect to the time limit for that action. As Justice Stewart stated in his concurring opinion in *Mitchell*, 451 U.S. at 68 n.4:

> [T]he fact that Congress did not provide a limitations period for a judicially enforceable action later found implied in the NLRA is not comparable to a congressional failure to establish a time limitation for an action it expressly creates by statute. . . . [I]t cannot reasonably be assumed here that congressional silence reflects an intent to apply state statutes of limitation for an action based in part on rights and obligations traceable to the NLRA.[6]

Thus, the ordinary primary guides to the "meaning of the enactment" (*see* p. 11, *supra*) are not available here. Congress has not specifically addressed the issue of the appropriate time limit for the judicial cause of action

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under the contract—and while such a claim may, as here, be coupled with a § 301 claim against the employer for an alleged breach of contract—the source of the cause of action against the *union* remains the same: an implied action under the NLRA.

Even if, *arguendo*, a fair representation claim were cognizable under § 301, it would still be true that such a claim is not the type of claim that Congress contemplated in enacting that section. Thus, even on that assumption, Congress' failure to prescribe a limitations period for § 301 actions generally could not be taken as indicating an intent to apply local limitations periods to actions of this type. And *Hoosier* expressly leaves open the possibility of applying a uniform federal limitations period for some types of § 301 actions. 383 U.S. at 705 n.7.

[6] *See also* Note, *Limitation Borrowing in Federal Courts*, 77 Mich. L. Rev. 1127, 1133 (1979) (in implied causes of action "one cannot infer . . . an intent to conform to the historical practice of borrowing limitations from state law; in these cases Congress has had no opportunity to consider enacting its own explicit limitation period").

for breach of the duty of fair representation, and the normal rule the Court has evolved for interpreting Congress' failure to specify a limitations period does not make sense in this context. But Congress has not left the Court without guidance as to the limitations period that should be applied to fair representation actions. For as we now show, the duty of fair representation is an integral part of the complex of employee, employer, and union rights that together comprise the national labor policy established by Congress; Congress, in enacting § 10 (b), has made a determination as to the limitations period that best accommodates the sometimes conflicting values embodied in that policy; and the same values are at stake in establishing a time limit for the judicial fair representation action.

1. (a) It is well-settled that all the interests here are component parts of the collective bargaining system established by the NLRA. The fair representation duty has been implied from those provisions of the NLRA that establish the "principle of majority rule"—a principle that is "[c]entral to the policy of fostering collective bargaining," *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 62 (1975).[7] The duty stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the[se] provisions of federal labor law." *Vaca v. Sipes, supra*, 386 U.S. at 182.

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[7] As the Court has explained, it is

> Because '[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit,' [that] the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, 'the responsibility and duty of fair representation.'" [*Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976); (citations omitted)]

At the same time it cannot be gainsaid that the pendency, or potential pendency, of duty of fair representation claims "threatens the smooth functioning of those consensual processes the federal labor law is chiefly designed to promote." *Hoosier, supra*, 383 U.S. at 702. The NLRA seeks to foster a "continuous collective bargaining process, " *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 578 (1960), through which is established "the law of the shop." *United Parcel Service v. Mitchell, supra*, 451 U.S. at 64. That process "is the keystone of the federal scheme to promote industrial peace." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

The collective bargaining process begins with the formation of a collective agreement. Congress' "manifest objective in providing for collective bargaining" was to facilitate "the making of contracts with labor organizations" since "the fundamental purpose of the Act [which] is to protect . . . commerce from interruptions and obstructions caused by industrial strife . . . appears to be served by these contracts in an important degree." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 236-37 (1938). And after the contract is made, the collective bargaining process continues in a grievance procedure for resolving disputes under the contract, and thereby further develop the law of the shop. As the Court recently stated:

> Fundamental to federal labor policy is the grievance procedure. It promotes the goal of industrial peace by providing a means for labor and management to settle disputes through negotiation rather than industrial strife. Adoption of a grievance procedure provides the parties with a means of giving content to the collective bargaining agreement and determining their rights and obligations under it. [*Bowen v. Postal Service*, —— U.S. ——, slip op. at 12 (January 11, 1983); (citations omitted)] [8]

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[8] *See also United Parcel Service v. Mitchell, supra*, 451 U.S. at 63-64; *Truck Drivers Union v. Riss & Co.*, 372 U.S. 517 (1963); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549 (1964).

In every suit alleging a breach of the fair representation duty, the plaintiff challenges the union's conduct either in "its negotiation of a collective bargaining agreement [or] in its handling of the grievance machinery." *Vaca v. Sipes*, *supra*, 386 U.S. at 181. In the former type of case, if the plaintiff proves that the union acted out of an improper purpose in negotiating the agreement, the result will be to overturn the agreement in whole or in part. *E.g.*, *Steele v. L. & N.R. Co.*, *supra*. In the latter type of cases, if the plaintiff establishes that the union acted improperly in prosecuting a grievance, the plaintiff will, perforce, have established that the "grievance procedure . . . malfunction[ed]," *Bowen v. Postal Service*, *supra*, slip op. at 10; *see Hines v. Anchor Motor Freight Inc.*, *supra*, 424 U.S. at 568, 570, 572. Having established such a malfunction, the resolution of the grievance—whether arrived at through arbitration or through an agreement by the parties—can no longer be accepted as giving meaning and content to the collective bargaining agreement (*see* p. 16, *supra*), and the parties to the agreement can no longer conduct themselves in reliance upon that resolution as the law of the shop. *See also* pp. 26-28, *infra*.[9] Thus, fair representation actions necessarily implicate the functioning of the "consensual processes" that the NLRA seeks to promote.

(b) Section 10(b) of the NLRA states Congress' judgment, albeit in the unfair labor practice content, as to the length of time that decisions arrived at through these

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[9] The instant case well illustrates the point. The arbitrator here decided a controversy concerning the Company's rights, under the collective agreement, in assigning work; his decision established a rule concerning work assignments which, presumably, the parties have been following. But if plaintiffs were able to prove, as they have alleged, that the Union's "preparation, investigation and handling of [respondents' grievances] was so inept and careless as to be arbitrary and capricious, denying the [respondents] a fair hearing on their grievance" (p. 4, *supra*), the correctness of the arbitrator's decision necessarily would be called into question, and the law of the shop would become uncertain.

consensual processes should be open to attack. That provision was fashioned by Congress as part of the federal labor laws to take into account the unique interests involved in this unique statutory context. In enacting § 10 (b), Congress determined that "the 'relatively rapid disposition of labor disputes' " should be "one of the leading federal policies in this area." *Mitchell, supra*, 451 U.S. at 63; *Clayton v. Auto Workers*, 451 U.S. 679, 693 (1981). Congress chose a six month time limit in § 10(b), as this Court has explained, in order to protect the "stability of bargaining relationships," *Machinists Local v. Labor Board*, 362 U.S. 411, 425 (1960); *see id.* at 419. Section 10(b) thus represents the balance that Congress, "[a]s expositor of the national interest," struck between the interests of employees in "vindicat[ing their] statutory rights" and the "interests in 'industrial peace which it is the overall purpose of the Act to secure,' " *id.* at 429-30. And as Justice Stewart observed in *Mitchell*, "[t]hat is precisely the balance at issue" in the fair representation context, 451 U.S. at 70.[10]

Indeed, in enacting the § 10(b) limitations period in the LRMA Congress made that limitations period applicable, in terms, to "claims of a very similar or identical character" to claims that later have come to be entertained under the fair representation rubric, as Justice Stewart also observed in *Mitchell*, 451 U.S. at 68 n.3. Specifically, in the LMRA Congress imposed certain express duties upon unions running to the employees the unions represent or seek to represent and Congress subjected actions for breaches of those duties to the § 10(b) limitations period.

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[10] In *Machinists Local*, the charge by the employees ran against the formation of the agreement; the employees alleged that the union had not represented a majority of the bargaining unit when the agreement was signed. Fair representation suits, as noted may challenge either the formation of the agreement or its administration (p. 17, *supra*), but both are parts of the collective bargaining system established by the Act (p. 16, *supra*).

Of particular relevance here are § 8(b)(1)(A), which makes it an unfair labor practice for a union "to restrain or coerce employees in the exercise of the rights guaranteed in section 7," including the § 7 right to "refrain from" concerted activities; and § 8(b)(2), which makes it unlawful for unions "to cause or attempt to cause an employer to discriminate against an employee" based on union membership or based upon an effort to encourage or discourage union membership. Under those two sections at least some breaches of the duty of fair representation—those in which the union's conduct rests on consideration of union membership or non-membership[11]—unquestionably constitute unfair labor practices as well. Indeed, in enacting §§ 8(b)(1)(A) & (b)(2), Congress proscribed the very conduct in which the union had engaged in *Steele* and in *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944), the pre-LMRA decisions of this Court touching on the duty of fair representation.[12]

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[11] As the Court explained in *Radio Officers v. Labor Board*, 347 U.S. 17, 40 (1954), § 8(b)(2) is "designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union"; thus, if a union discriminates against an employee in providing representation because the employee has chosen to "abstain from joining" the union or to be a "bad or indifferent member" of the union, § 8(b)(2), as well as the duty of fair representation, is violated.

[12] In *Steele*, the black plaintiffs could not become—and thus were not—members of the union and the contract provisions that were challenged "restricted [plaintiffs'] employment for the benefit and advantage of the Brotherhood's own members." 323 U.S. at 198.

In *Wallace Corp.*, an independent union with which the employer had a collective agreement had refused to admit "CIO men" to membership as a result of which the employer, pursuant to the union security provision of the agreement, discharged the "CIO men" as non-members of the independent union. The Court in *Wallace Corp.* held that in so doing the employer had violated § 8(3)—now § 8(a)(3)—of the Act, and was not privileged to do so by virtue of the union security agreement. The Court stated:

> The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the inter-

Subsequent to the enactment of the LMRA, the Labor Board,[13] with the approval of most of the courts of appeals,[14] has held that *all* breaches of the duty of fair representation violate §§ 8(b)(1)(A) or (b)(2). This Court has twice declined to decide whether the Board and the lower courts are correct in that position, *Vaca v. Sipes, supra*, 386 U.S. at 386; *Humphrey v. Moore, supra*, 375 U.S. at 344. That question thus remains an open one in this Court.

Regardless of how that issue ultimately is resolved, however, this much is clear: § 10(b) applies, in terms, to at least some unfair representation claims when those claims are brought before the NLRB. Section 10(b) also applies to other claims that are related to fair representation claims in that they involve interests of employees similar to the interests that are asserted in fair representation suits. *E.g., Machinists Local v. Labor Board,*

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ests of its own group members. By its selection as a bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. * * * We do not construe the provision [in § 8(3)] authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the act to protect for all workers. It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone. [323 U.S. at 255-256]

The legislative history of § 8(b)(2) makes clear that one of the principal evils to which that section was addressed was conduct of the type in which the union had engaged in *Wallace Corp.* See 2 Leg. History of the LMRA at 1010, 1096, 1420.

[13] *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enf. denied*, 326 F.2d 172 (2nd Cir. 1963).

[14] *See* cases cited in Justice Stewart's concurring opinion in *Mitchell*, 451 U.S. at 67-68 n.3.

supra. Thus, § 10(b)—unlike any state limitations period that might be borrowed in its stead—was fashioned by Congress to take into account the special considerations that are implicated here in the same way as in claims to which the provision expressly applies. As Justice Stewart put it, § 10(b) represents a "clear congressional indication of the proper balance between the interests at stake," 451 U.S. at 70-71.

(c) Finally, application of state limitations periods, rather than § 10(b) would lead to two anomalous results —results that Congress could not have intended or desired. First, unless § 10(b) is applied to judicial fair representation claims, the limitations period for such claims would vary depending on the forum chosen (i.e., the NLRB or the courts) or, perhaps, depending on the specific type of fair representation violation alleged. The result would be to favor one forum over another or certain types of fair representation claims over other types for reasons that would be wholly arbitrary.

Second, unless § 10(b) is applicable, the period of time during which collective bargaining agreements, or grievance resolutions under such agreements, would be subject to challenge would vary from state to state; indeed, the very same agreement or grievance resolution could be vulnerable in one state and not in another. This Court has held that "[t]he need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it." *Hoosier*, *supra*, 383 U.S. at 702. Failure to apply § 10(b) to fair representation claims would deny uniformity precisely where "the need for uniformity . . . is greatest." *See also Chevron Oil Co. v. Huston*, 404 U.S. 97, 104 (1971).

For all the foregoing reasons, § 10(b) is the proper source for determining the timeliness of fair representation claims.

2. In reaching its contrary conclusion, the court below (*see* Pet. App. at 5a-6a) relied exclusively on Justice Stevens' concurring and dissenting opinion in *Mitchell*. In that opinion, Justice Stevens, while agreeing with the majority that the applicability of § 10(b) to fair representation claims was not properly presented (pp. 9-10, *supra*), criticized the suggestion that § 10(b) be applied to such claims as "strained." 451 U.S. at 75. Noting that by its terms "[t]he plain language of [§ 10(b)] indicates that it is directed solely to the administrative procedure established by Congress . . . for the resolution of unfair labor practice charges," Justice Stevens reasoned that "[n]othing in the statutory language suggests that Congress intended that this 6-month limitations period be applied" to fair representation claims brought to the judiciary. *Id.* at 76 n.8. Indeed, to Justice Stevens it followed that Congress could not have so intended, since "this Court had not yet divined" the fair representation action" when § 10(b) was enacted." *Id.* at 75-76.

We agree, of course, that in enacting § 10(b), Congress did not—indeed could not—have had it in mind that that limitations period would apply to judicial fair representation actions because such causes of action had not yet been "divined" by this Court.[15] But is is *equally* true that

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[15] In 1947, when the § 10(b) limitations period was enacted as part of the LMRA amendments to the Wagner Act, the fair representation cause of action had been implied only under the Railway Labor Act, *Steele v. L. & N.R. Co.*, *supra*; *Tunstall v. Brotherhood*, *supra*, and not under the NLRA. And as Justice Powell explained in *Cannon v. University of Chicago*, 441 U.S. 677, 734 (1979) (dissenting opinion):

> The case for implication of judicial remedies was especially strong with respect to [the Railway Labor Act], as Congress had repealed its predecessor . . . after [this Court] had held that judicial enforcement of its terms was not available. Convinced that Congress had meant to accomplish more through the 1926 Act, and faced with the absence of an express administrative and judicial enforcement mechanism, the Court in, *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548 (1930), upheld an injunction enforcing the Act's prohibition of em-

in enacting the Wagner Act and in amending that Act in the LMRA, Congress did not—indeed could not—have had it in mind that local limitations periods would apply to such not-yet-divined actions. As we have seen, Congress never faced the limitations problem presented here as such.

To recognize this, however, is simply to pose—rather than to resolve—the problem here: in the absence of an express congressional decision, is § 10(b) or state law the appropriate source for determining the timeliness of fair representation actions. And for the reasons previously stated, we submit that, in light of the choices that Congress did make in enacting the NLRA, the application of

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ployer interference in employee's organizational activities. Buttressed by 1934 amendments to the Act that indicated congressional approval of this step, the Court in *Virginia R. Co. v. Railway Employees*, 300 U.S. 515 (1937), extended judicial enforcement to the Act's requirement that an employer bargain with its employees' authorized representative. Finally, in *Steele* . . . and *Tunstall* . . . the Court further held that the duty of a union not to discriminate among its members also could be enforced through the federal courts. In each of these cases . . . the implication of some kind of remedial mechanism was necessary to provide the enforcement authority Congress clearly intended.

Because the NLRA, in contrast to the Railway Labor Act, does embody an elaborate, express administrative enforcement mechanism, the decision whether to imply from the NLRA a cause of action for breach of the (implied) duty of fair representation involved different considerations. Thus, although dictum in *Wallace Corp., supra*, 323 U.S. at 255-56, decided the same day as *Steele* and *Tunstall*, suggested that a fair representation duty existed under the NLRA, *see* n.12, *supra*, it was not until a decade later—long after the LMRA with § 10(b) was enacted—that the Court found an implied fair representation cause of action under the NLRA. *Ford Motor Co. v. Huffman, supra*, 345 U.S. at 332 n.4; *Syres v. Oil Workers, supra*. Thus, the fact that § 10(b) is phrased as a limitations period only for the administrative actions that Congress expressly created does not support a negative inference that Congress considered but rejected applying § 10(b) to judicial fair representation actions. *See also* p. 13, *supra*.

§ 10(b), rather than local limitations periods of varying lengths—some longer and some shorter than the six-month period of § 10(b) [16]—best effectuates the intent of Congress in enacting that law.

II. ASSUMING, *ARGUENDO*, THAT STATE STATUTES OF LIMITATIONS, RATHER THAN § 10(b), SUPPLY THE LIMITATIONS PERIOD FOR FAIR REPRESENTATION CAUSES OF ACTION, THE STATE LIMITATIONS STATUTE FOR ACTIONS TO VACATE ARBITRATION AWARDS DETERMINES THE TIMELINESS OF THE FAIR REPRESENTATION CLAIM AT ISSUE HERE.

If the Court were to conclude, contrary to our showing in Part I, that state statutes of limitations, rather than § 10(b), apply to judicial fair representation claims, the Court's "task" here, as in *Mitchell*, would be "to determine which [state] limitations period is 'the most appropriate one provided by state law,'" 451 U.S. at 60. The court below concluded that New York's three-year limitations period for nonmedical malpractice actions should be applied to the cause of action against the union even though, following *Mitchell*, the court applied New York's ninety-day limitations period for actions to vacate arbitration awards to the cause of action against the employer. As we proceed to show, *Mitchell* compels the conclusion that the arbitration statute applies to both causes.

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[16] As we show in Part II, *infra*, if § 10(b) is not applicable here, then, under this Court's decision in *Mitchell*, New York's ninety-day statute of limitations for actions to vacate arbitration awards would apply, a shorter limitations period than that provided by § 10(b). Indeed, in *DelCostello v. Teamsters*, No. 81-2386, with which the instant case has been consolidated, the *plaintiff* seeks to avoid the applications of Maryland's thirty-day arbitration statute by urging the application of § 10(b); the defendants in that case are opposing § 10(b). This has happened in other cases as well. *E.g.*, *Kaftantzis v. D&L Transport Co.*, 531 F. Supp. 566 (N.D. Ill. 1982); *Fedor v. Hygrade Food Products Corp.*, 533 F. Supp. 269 (E.D. Pa.), *aff'd*, 687 F.2d 8 (3rd Cir. 1982); *Sheeran v. M.A. Bruder & Sons, Inc.*, 524 F. Supp. 567 (E.D. Pa. 1981).

At the threshold, it is important to be clear as to the nature of the claim against the union here. This case is a typical "hybrid § 301 breach-of-duty action," *Mitchell, supra*, 451 U.S. at 60 *n.* 2, in which it is alleged that the employer breached its collective bargaining agreement and that the union breached its duty of fair representation in prosecuting plaintiffs' grievances over the employer's asserted contractual breach.[17] In such cases, the claim against the union necessarily challenges the validity of the resolution of the grievance reached through the grievance-arbitration process—here the decision of the arbitrator [18]—just as does the claim against the employer. This is so for two reasons.

First, as this Court has recently ruled in *Bowen v. Postal Service, supra*, in a judicial fair representation action the union may be held liable for a portion of the plaintiff's *back wages* insofar as those back wages are attributable to the union's breach. Such liability necessarily depends on a finding, as part of the case against the union, that a breach of contract occurred and thus that the decision arrived at through the grievance-arbitration process—here the decision of the arbitrator—was incor-

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[17] The claim against the employer—the claim to which the court below applied the arbitration statute of limitations—arose under § 301 of the LMRA, 29 U.S.C. § 185 with jurisdiction predicated on that section; the claim against the union—the claim remaining before this Court—is a judicially implied cause of action under the NLRA for breach of the duty of fair representation, with jurisdiction predicated on 28 U.S.C. §§ 1331 and 1337 (*see* pp. 13-14, *supra*).

[18] In *Mitchell* the Court did not have occasion to decide whether the arbitration statute would apply if the grievance over the employer's asserted contract breach had been resolved by the parties short of the final step of the grievance procedure. That question, which has been raised in a number of subsequent, lower court decisions, *e.g., Hall v. Printing & Graphic Arts Union Local 3*, No. 82-1109 (7th Cir., Dec. 21, 1982); *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982), is not presented here either, because in the instant case plaintiff's grievance was resolved, adversely to plaintiffs, in arbitration.

rect. Indeed, this Court has repeatedly recognized as much in ruling that in such "hybrid" actions the plaintiff's claim against the union requires a showing that the employer breached the contract: "To prevail against either the company *or the Union*, [plaintiffs] must not only show that [the employer's action] was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Hines*, *supra*, 424 U.S. at 570-71 (emphasis added); *Mitchell*, *supra*, 451 U.S. at 62.

Second, regardless of what relief is sought from the union—and back pay is almost invariably sought in "hybrid" fair representation cases—an allegation that the union breached its duty of fair representation in prosecuting a grievance necessarily implicates the validity of the resolution of that grievance in the grievance-arbitration process. For proof of the allegation that the union breached its duty would establish that the grievance process "malfunctioned" (p. 17, *supra*). Such proof would drain all precedential force from the arbitrator's decision and thereby defeat a critical function of labor arbitration: to develop the "law of the shop" by giving meaning and content to the collective bargaining agreement (pp. 16-17, *supra*). When an arbitral decision has been found by a court to have been rendered through a defective process, the parties cannot rely on that decision in their primary conduct in the workplace.[19]

This Court's holdings in both *Hines* and *Mitchell* rest on the recognition that an allegation that the union breached its fair representation duty necessarily entails

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[19] Justice Stevens' opinion "concurring in part and dissenting in part" in *Mitchell*, 451 U.S. at 71, states that unlike the claim against the employer, the claim against the union would not, if the plaintiff were to prevail, have the effect of undoing the arbitration award. 451 U.S. at 72-73. That statement was relied upon by the court below in reaching its decision in this case (Pet. App. 3a, 5a). For the reasons set forth in the text, we respectfully suggest that Justice Stevens' statement is simply not correct especially where, as here, plaintiff seeks an award of back pay from the union.

a challenge to the arbitration process. In *Hines* the Court held that "if it seriously undermines the integrity of the arbitral process the union's breach [of its fair representation duty] removes the bar of the finality provisions of the contract," 424 U.S. at 567, thereby enabling an employee to pursue a challenge to his employer's asserted breach of contract. The Court explained:

> Petitioners are not entitled to relitigate their discharge merely because they offer newly discovered evidence that the charges against them were false and that in fact they were fired without cause. The grievance processes cannot be expected to be error-free. The finality provision has sufficient force to surmount occasional instance of mistake. *But it is quite another matter to suggest the erroneous arbitration decisions must stand even though the employee's representation by the union has been dishonest, in bad faith, or discriminatory*; for in that event error and injustice of the grossest sort would multiply. . . .' *In our view, enforcement of the finality provisions where the arbitrator has erred is conditioned upon the union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings.* [*Id.* at 571 (emphasis added)]

Similarly, in *Mitchell* the Court based its conclusion that the statute of limitations for actions to vacate arbitration awards applied to the "hybrid" cause of action against the employer in that case on the fact that proof of unfair representation by the union—which proof necessarily would challenge the arbitration process—was an essential element of the cause against the employer.[20]

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[20] The plaintiff in *Mitchell* had sued both the employer and the union, but only the claim against the employer was before this Court (as the union did not seek review of the lower court's decision with respect to the limitations period for the claim against it). Consequently, the holding of *Mitchell* is limited to "hybrid" claims against employers.

The *Mitchell* Court recognized the superficial plausibility of applying a contract limitations period to that cause, since "[i]t is true that respondent's underlying claim against his employer is based on the collective-bargaining agreement, a contract." 451 U.S. at 62. But the Court nonetheless rejected the applicability of that limitations period because, under *Hines*, proof of the union's breach of duty was necessary before the breach of contract issue could be reached:

> It is not enough . . . for an employee such as respondent to prove that he was discharged in violation of the collective-bargaining agreement. . . . [R]*espondent's characterization of his action against the employer as one for "breach of contract" ignores* the significance of the fact it was brought in the District Court pursuant to § 301(a) of the LMRA and *that the indispensable predicate for such an action is not a showing under traditional contract law that the discharge was a breach of the collective-bargaining agreement, but instead a demonstration that the union breached its duty of fair representation.* Since the conclusion of the Joint Panel was, under the collective-bargaining agreement, "binding upon all parties," *respondent was required in some way to show that the Union's duty to represent him fairly at the arbitration had been breached before he was entitled to reach the merits of his contract claim. This, in our view, makes the suit more analogous to an action to vacate an adbitration award than to a straight contract action.*
>
> We think that the unfair representation claim made by an employee against his union, even though his employer may ultimately be called upon to respond in damages for it if he is successful, is more a creature of "labor law" as it has developed since the enactment of § 301 than it is of general contract law. [451 U.S. at 62-63; emphasis added]

Thus, it was the alleged breach of the fair representation duty by the *union* in *Mitchell* that led the Court to

find the case against the employer analogous to an action to vacate an arbitration award rather than a contract action. The employer secured the benefit of the arbitration limitations period (even though the employer's alleged misdeed was a breach of contract) because, under *Hines*, proof of a breach of the *union's* duty—which breach, if proved, would necessarily establish the invalidity of the arbitral process—was an element of the § 301 claim against the employer. But given this reasoning it would be anomalous, at least, not to give a union the benefit of the arbitration limitations period where, as here, the claim is against the union itself for its asserted breach of duty. Indeed, since the elements of the claim against the employer and union are identical (p. 26, *supra*), application of a shorter limitations period for claims against employers would make no sense.[21]

It follows that if § 10(b) is not applicable here, New York's 90-day limitations period for actions to vacate arbitration awards is. In either event, respondents' claim against the Union, which was filed eleven months after the arbitrator rendered his decision, is untimely.

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[21] In the wake of *Mitchell*, most courts of apeals have reached this conclusion. *See Fedor v. Hygrade Food Products Corp.*, 687 F.2d 8 (3rd Cir. 1982); *DelCostello v. Teamsters*, No. 81-2086 (4th Cir. 1982), *cert. granted*, No. 81-2386; *Badon v. General Motors Corp.*, 679 F.2d 93, 98 (6th Cir. 1982); *Stevens v. Gateway Transportation Co.*, No. 82-1222 (7th Cir. 1982); *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1353 (9th Cir. 1981). The overwhelming weight of district court authority is in accord. *See* our petition for certiorari at 9 n. 3. The Eleventh Circuit, however, has followed the decision below and reached a contrary conclusion, *Hand v. Chemical Workers*, 681 F.2d 1308 (11th Cir. 1982), although that court has granted a petition for hearing *en banc* in that case, *id.* And two different panels of the Fifth Circuit have reached conflicting decisions on the issue. *Compare Edwards v. Sea Land Service, Inc.*, 678 F.2d 1276 (5th Cir. 1982) *with Rigby v. Roadway Express, Inc.*, 680 F.2d 342 (5th Cir. 1982).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, provides in pertinent part as follows:

Section 7 [29 U.S.C. § 157]:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 [29 U.S.C. § 158]:

Unfair Labor Practices.

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 9 [29 U.S.C. § 159]:

Representatives and elections.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 10 [29 U.S.C. § 160]:

Prevention of Unfair labor practices.

* * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency desig-

nated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 7511(a) of the New York Civil Practice Laws and Rules, CPLR § 7511(a) (McKinney), provides as follows:

> An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

Section 214(6) of the New York Civil Practice Laws and Rules, CPLR § 214(6) provides in pertinent part as follows:

The following actions must be commenced within three years:

* * * *

> 6. an action to recover damages for malpractice; . . .

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